

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. CR-96-71-P-H</b>
	)	<b>(Civil No. 97-294-P-H)</b>
<b>WILLIAM D. RAGUSA,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION  
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

William D. Ragusa moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 27 months imprisonment was imposed following Ragusa’s plea of guilty to a charge of possession of a firearm transported in interstate commerce by a felon, a violation of 18 U.S.C. § 922(g)(1). Judgment (Docket No. 25). Ragusa, appearing *pro se*, contends that he received ineffective assistance of counsel.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that certain allegations are contradicted by the record and that the remaining allegations, accepted as true, would not entitle Ragusa to relief. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

## **I. Background**

On February 14, 1997 Ragusa entered a plea of guilty to one count of an indictment charging him with possession of a firearm transported in interstate commerce by a felon. Transcript of Proceedings (Docket No. 33) at 3; Judgment at 1. He was sentenced to a term of 27 months imprisonment on May 15, 1997. Judgment at 2. The prior conviction upon which Ragusa's status as a felon was based was a conviction in Massachusetts of assault and battery with a dangerous weapon, a violation of Chapter 265, Section 15A, of the Massachusetts General Laws. Indictment (Docket No. 4) at 1. Ragusa took no direct appeal.

## **II. Analysis**

Ragusa asserts that his guilty plea was coerced by his counsel and that he received ineffective assistance of counsel in that his counsel failed to demonstrate to the court that the Massachusetts conviction was a misdemeanor rather than a felony, failed to move for dismissal on the basis of entrapment by estoppel, and failed to investigate the Massachusetts conviction to determine whether it was obtained in violation of Ragusa's constitutional rights. Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 26) at 5-6. Ragusa's allegation of coercion is based on his counsel's alleged failure to determine whether Ragusa's civil rights had been restored subsequent to the Massachusetts conviction and is more appropriately considered as another specific allegation of ineffective assistance of counsel.

The statute that establishes the crime to which Ragusa pleaded guilty in this court provides, in relevant part:

It shall be unlawful for any person — (1) who has been convicted in any

court of[] a crime punishable by imprisonment for a term exceeding one year; . . . to . . . possess in or affecting commerce[] any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate . . . commerce.

18 U.S.C. § 922(g).

The term “crime punishable by imprisonment for a term exceeding one year” does not include — . . . (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20).

The statute under which Ragusa was convicted in Massachusetts provides:

Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Mass. Gen. Laws ch. 265, § 15A(b).

*Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that counsel’s performance was deficient, i.e., that the attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Second, the defendant must make a showing of prejudice, i.e., “that counsel’s errors were so serious as to deprive the

defendant of a fair trial, a trial whose result is reliable.” *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To satisfy the “prejudice” requirement in such a context, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59. This protestation must be accompanied by a claim of innocence or the articulation of a plausible defense that he could have raised at trial. *United States v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d in part on other grounds*, 117 S.Ct. 1573 (1997).

Two of Ragusa’s arguments arise out of the statutory definition. He argues that the Massachusetts conviction involved a misdemeanor rather than a felony because he was not indicted and because he was sentenced only to a suspended term of 90 days. Neither factor governs the question whether a crime is considered a felony or a misdemeanor by the state in which the conviction is obtained. In fact, Massachusetts considers violation of chapter 265, section 15A, of its General Laws to be a felony. *Commonwealth v. Pierce*, 642 N.E.2d 579, 584 (Mass. 1994). In addition, the crime of assault and battery with a dangerous weapon is punishable in Massachusetts by a term of up to two and one-half or ten years, which also takes it out of the exception to the definition of crimes punishable by imprisonment for a term of more than one year in 18 U.S.C. § 921(a)(20).

Ragusa’s alternative argument, that his civil rights were restored so that the Massachusetts conviction may not be considered as the basis for the charge to which he pled guilty, founders on the shores of *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997), which was decided a few weeks

before he entered his plea. In that case, the First Circuit held that Massachusetts's ban on handgun possession by ex-felons outside the home or business is a substantial enough limit to preserve the federal ban established by 28 U.S.C. § 922(g)(1). Ragusa attempts to distinguish *Estrella* by arguing that his conviction was only for a misdemeanor, but that argument, as discussed above, is incorrect as a matter of law. As to the first two arguments, therefore, the actions which Ragusa asserts that his counsel should have undertaken would have been futile. Neither provides any basis for a finding that his counsel committed error.

Ragusa next asserts that his counsel should have asserted a defense of entrapment by estoppel. This defense requires that the defendant have relied on a representation by an authorized government official that his possession of a firearm was legal. *United States v. Caron*, 64 F.3d 713, 715-17 (1st Cir. 1995). Ragusa makes no allegation that any such representation was made by any individual. Ragusa's erroneous belief that he had been convicted only of a misdemeanor is insufficient to raise this defense. *Id.* at 716. Therefore, he has provided no evidence that such a defense could have been asserted by his counsel and has thus failed to show an error in that regard.

The final argument offered by Ragusa is that his counsel should have investigated the Massachusetts conviction, in which case, Ragusa asserts, his counsel would have discovered that his guilty plea to that charge was not made knowingly and voluntarily because there was no plea colloquy. This appears to be a claim of constitutional infirmity in the underlying conviction. However, the Supreme Court has held that an underlying state conviction used to enhance sentencing for a defendant convicted of being a felon in possession of a firearm under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is not open to collateral attack on constitutional grounds in a federal sentencing proceeding so long as the defendant was represented by counsel in the state court

action. *Custis v. United States*, 511 U.S. \_\_\_, 128 L.Ed.2d 517, 525-28 (1994). The Supreme Court noted that principles of finality associated with habeas corpus proceedings

bear extra weight in cases in which the prior convictions . . . are based on guilty pleas, because when a guilty plea is at issue, “the concern with finality served by the limitation on collateral attack has special force.” *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

*Custis*, 128 L.Ed.2d at 529.

In the present case, the issue is not sentence enhancement under section 924 but the defendant’s status as a felon, an element of the offense under section 922. However, the Supreme Court’s reasoning in *Custis* applies with equal force to this situation. Ragusa concedes that he was represented by counsel when he entered his guilty plea to the Massachusetts felony charge. Petitioner Ragusa’s Abbreviated Memorandum Supporting His Motion for an Evidentiary Hearing (Docket No. 26) at 8, n. 7. Under the circumstances, he may not attack the Massachusetts conviction in this proceeding. He is not precluded from bringing another motion should he be successful in obtaining vacation of the Massachusetts conviction. 28 U.S.C. § 2255; *United States v. Pettiford*, 101 F.3d 199, 200, 202 (1st Cir. 1996).

The fact that Ragusa has cast this claim in terms of ineffective assistance of counsel rather than making a direct attack on the Massachusetts conviction makes no difference in the outcome. *Custis* was a direct appeal from a sentence, not a section 2255 collateral proceeding. Under *Custis*, Ragusa’s counsel could not have successfully attacked the Massachusetts conviction because Ragusa was represented in that case. Therefore, the failure of Ragusa’s counsel to investigate the circumstances of the Massachusetts guilty plea could not have caused prejudice to Ragusa.

### III. Conclusion

For the foregoing reasons, I recommend that Ragusa's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this \_\_\_\_ day of November, 1997.*

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*David M. Cohen  
United States Magistrate Judge*